

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FRANCISCO JAVIER PEREZ-TAPIA,
Petitioner.

No. 2 CA-CR 2015-0069-PR
Filed March 30, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County

No. CR2012144809001DT

The Honorable Karen L. O'Connor, Judge

REVIEW GRANTED; RELIEF GRANTED

Francisco Javier Perez-Tapia, Phoenix
In Propria Persona

STATE v. PEREZ-TAPIA
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Francisco Perez-Tapia seeks review of the trial court's order dismissing as untimely his of-right notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). For the following reasons, we grant relief.

¶2 In December 2012, Perez-Tapia pled guilty to possession of a narcotic drug for sale. He later sought to withdraw from that plea, arguing he had not been adequately advised of the immigration consequences of pleading guilty to a drug trafficking offense. The trial court denied the motion and, at the February 5, 2013, sentencing hearing, suspended the imposition of sentence and placed Perez-Tapia on a three-year term of probation.

¶3 On September 4, 2013, Perez-Tapia filed a notice of post-conviction relief, in which he stated that his "appointed counsel fail[ed] to file a Post Conviction Relief Notice" in his case and that counsel should have raised claims that counsel was ineffective for failing to file a notice of appeal, argue there was insufficient evidence to support his conviction, and raise a claim of actual innocence. The trial court summarily dismissed Perez-Tapia's notice as untimely, noting that a claim of ineffective assistance of counsel could not be raised in an untimely Rule 32 proceeding. This petition for review followed.

¶4 On review, Perez-Tapia claims, inter alia, that his notice was not untimely because his counsel failed to file a timely notice of post-conviction relief, entitling him to relief pursuant to Rule 32.1(f).

STATE v. PEREZ-TAPIA
Decision of the Court

That claim may be raised in an untimely post-conviction proceeding like this one. Ariz. R. Crim. P. 32.4(a). And, although Perez-Tapia's notice below did not cite Rule 32.1(f), he clearly sought to raise that claim. Thus, the trial court erred by summarily dismissing the notice of post-conviction relief on the basis Perez-Tapia could not raise the claim in an untimely proceeding. Moreover, although Perez-Tapia did not expressly request that counsel be appointed, he is entitled to counsel in this, his first post-conviction proceeding. Ariz. R. Crim. P. 32.4(c)(2); see *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 15, 250 P.3d 551, 555 (App. 2011). Finally, we note that the state did not oppose the requested relief.

¶5 Accordingly, we grant review and relief.¹ We vacate the order dismissing Perez-Tapia's notice of post-conviction relief and remand the case to the trial court for further proceedings consistent with this decision.

¹Because the trial court erred by dismissing Perez-Tapia's notice of post-conviction relief, we need not address the substantive claims raised in his petition for review.